No. 87-6116

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

STEVEN ANTHONY PENSON,

Petitioner,

—v.—

STATE OF OHIO,

Respondent.

ON WRIT OF *CERTIORARI* TO THE
COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE CIVIL LIBERTIES UNION OF OHIO, AND THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a state appellate court commits reversible constitutional error if it fails to provide an indigent criminal appellant with a professional advocate to press claims that are acknowledged to be nonfrivolous.

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INTEREST OF THE AMICI CURIAE

The American Civil Liberties Union is a nationwide, nonpartisan organization of more than 250,000 persons, dedicated to preserving and protecting the civil rights and civil liberties guaranteed by law. The ACLU of Ohio is one of its affiliates.

The National Legal Aid and Defender Association is a private, non-profit, national membership organization headquartered in Washington, D.C., whose purpose is to ensure the availability of quality legal services in civil and criminal cases to all persons unable to retain counsel. Specifically, the NLADA represents approximately 1,753 programs engaged in providing representation to indigents arrested on or convicted of criminal charges. The membership of NLADA, therefore, comprises most public defender offices and legal services agencies around the nation.

Both the ACLU and the NLADA have long worked to protect the rights of criminal defendants and have filed many briefs, as counsel for a litigant or as amicus curiae, in criminal cases requiring the interpretation of federal constitutional provisions.

With the consent of the parties, indicated by letters lodged with the Clerk of this Court, we file this brief amici curiae in support of the petitioner.

STATEMENT OF THE CASE

The procedural history of this case is described in the opinion of the Ohio Court of Appeals. The petitioner, Steven Anthony Penson, and two co-defendants, Richard Brooks and John Albert Smith, Jr., were tried jointly on multiple charges. All three men were convicted on at least some counts and were sentenced to prison terms. Because all three were indigent, separate counsel was appointed for each to press appeals as of right to the Ohio Court of Appeals.

Counsel for Brooks and Smith filed briefs on behalf of their clients. By contrast, the attorney assigned to represent Mr. Penson moved to withdraw on the basis of a conclusory statement that he had "carefully reviewed" the record and had found "no errors requiring reversal, modification and/or vacation" of Penson's convictions or sentences. Petition

for Writ of Certiorari at A9 (emphasis supplied).

The court of appeals granted counsel's motion to withdraw, but rejected Penson's request that another lawyer be appointed to pursue the appeal. Penson was given time in which to file a brief pro se, but he was unable to do so. The court of appeals then decided the issues on appeal aided only by the briefs filed on behalf of the co-defendants.

The court of appeals identified "several arguable claims" available to Penson and, indeed, concluded that one such claim was meritorious. Finding the evidence insufficient to support a jury instruction regarding one count of assault, the court reversed Penson's conviction on that count and vacated the relevant sentence. Penson's other convictions, together with the sentences attached to them, were sustained summarily.

The court of appeals was "troubled" that Penson's appointed attorney failed to recognize any arguable claims and frankly found counsel's position to be "highly questionable." Petition for Writ of Certiorari at A5-6. Nevertheless, the court considered the appeal without benefit of an advocate for Mr. Penson. Resting on its own review of the file and on the co-defendants' briefs, the court concluded that Penson had "suffered no prejudice" flowing from his attorney's failure to give the record a "more conscientious examination." Id. at A6.

Represented by a different attorney, Mr. Penson challenged the court of appeals' disposition of his right to counsel in an appeal to the Ohio Supreme Court. That court dismissed for want of a "substantial" question, and this Court granted Penson's subsequent petition for a writ of certiorari.

SUMMARY OF ARGUMENT

This is one in a series of recent cases in which the Court has the opportunity to elaborate upon the states' constitutional responsibility to provide effective advocates to indigent criminal appellants.[1] This case, however, presents no novel questions. Rather, it presents an enforcement problem created by the failure of Ohio's appellate courts to conform their practices to this Court's well-established rulings, both in this instance and

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[1] E.g., Evitts v. Lucey, 469 U.S. 387 (1985)(recognizing that criminal appellants have a fourteenth amendment right to the effective assistance of counsel); Pennsylvania v. Finley, 107 S.Ct. 1990 (1987)(reaffirming the right to effective assistance of counsel on appeal but treating post-appeal state proceedings differently); McCoy v. Wisconsin Court of Appeals, No. 87-5002 (involving a Wisconsin rule requiring appellate counsel who wish to withdraw to discuss why they believe their clients' claims to be frivolous). The ACLU and the NLADA filed independent amicus briefs in Finley and joined in a brief in McCoy. Those briefs may be read in conjunction with this one.

in many other instances identified by Mr. Penson's current attorney.

The Ohio courts' failure to provide Mr. Penson with a professional advocate to brief nonfrivolous issues on appeal represents a glaring violation of the due process and equal protection clauses of the fourteenth amendment. In prior cases, this Court has made it clear that indigent appellants have a right to effective assistance of counsel on first appeal as of right. In this case, the Ohio courts violated that right by considering Mr. Penson's appeal without benefit of such an advocate.

To be sure, counsel was initially appointed for Mr. Penson by the Ohio Court of Appeals. Despite the existence of arguable claims that might have been raised on Penson's behalf, however, that lawyer was permitted to withdraw without filing a brief to assist his

client and the court. Counsel's performance was not only inadequate in light of this Court's decision in Anders v. California, 386 U.S. 738 (1967), and ineffective within the meaning of Evitts v. Lucey, supra, but nonexistent in violation of Douglas v. California, 372 U.S. 353 (1963).

Mr. Penson can be denied relief only if the Court sees fit to change well-settled propositions of constitutional law. Any such change would be unnecessary and unwise. In particular, we believe that Anders strikes an appropriate balance between counsel's obligations to the client and to the court. The doctrine set forth in Anders is not a set of judge-made nonconstitutional guidelines designed to assist the state courts. That doctrine is hard constitutional law, forged to address a vexing problem in criminal justice administration in a manner that is both

theoretically sound and practically workable.

Under Anders, counsel may request permission to withdraw when he or she can find no issues that are so much as "arguable," in the sense that they are not wholly "frivolous." In cases in which nonindigent appellants are able to retain counsel, both client and counsel have powerful incentives to pursue an appeal on the merits. The client's interest is in seeking reversal and avoiding loss of liberty; retained counsel's interest is economic--and often substantial. By contrast, in cases involving indigent appellants, counsel's incentives work in the opposite direction. Private attorneys stand to collect only modest fees for appellate assignments and thus wish to move on to more lucrative cases; public defenders wish to concentrate effort on the most promising cases on their crowded dockets.

Anticipating that appointed lawyers will undervalue indigents' claims, this Court has only two realistic options: (1) A general rule requiring appointed counsel to brief the merits notwithstanding a personal judgment that none is arguable; (2) The less demanding rule in Anders, which requires counsel to file a brief identifying the claims counsel considered in coming to his or her conclusion.

Given counsel's incentives to undervalue such claims, it is essential that the appellate court make an independent appraisal of the record and thus check counsel's judgment. An "Anders brief" is easy to prepare and plainly necessary if the court is to make an intelligent, informed decision.

Finally, the constitutional right at stake in this case and others like it cannot properly be subject to a special "prejudice" requirement. This Court has never required a showing of "prejudice" in right-to-counsel cases. The critical distinction is between misfeasance and nonfeasance. Since Mr. Penson's appointed attorney did not merely perform poorly, but failed to perform at all, the unfavorable portions of the resulting judgment cannot stand.

ARGUMENT

I. THE OHIO COURTS' FAILURE TO PROVIDE THE PETITIONER WITH A PROFESSIONAL ADVOCATE TO PRESS NON-FRIVOLOUS CLAIMS ON FIRST APPEAL AS OF RIGHT VIOLATED THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT AS INTERPRETED IN THIS COURT'S PRECEDENTS

For twenty-five years, it has been settled that indigent criminal appellants are constitutionally entitled to appointed counsel on first appeal as of right. Douglas v. California, supra. Any other rule would deny indigent appellants a fair opportunity to make use of the appellate process (a denial of due process) and would penalize impoverished citizens unable to purchase effective legal services (a denial of equal protection of the laws). See Pennsylvania v. Finley, supra at 1993; Evitts v. Lucey, supra at 405 & n.12 (reaffirming that the right recognized in Douglas rests on both the due process and equal protection clauses).

This right to counsel on appeal implies, of course, a right to effective counsel, namely an attorney who takes the role of an "active advocate" as opposed to a "mere friend of the court assisting in a detached evaluation of the appellant's claims." Evitts, supra at 394.

In cases like this one, in which a lawyer assigned to represent an indigent on appeal actively resists performing the functions expected of an advocate, both the client's right to counsel and the corollary right to effective counsel are at risk. An appellate court cannot simply permit appointed counsel to withdraw and refuse to appoint a substitute, thus taking back from the appellant the very professional representation to which the client is constitutionally entitled.

Nor can a court accept such an attorney's unilateral conclusion that the claims available to the client are frivolous and thus not worth pursuing. If the right to an appellate advocate is to be taken seriously, the court must make its own independent examination of those claims--to ensure that lawyers do not resolve doubts against an indigent client in order to justify passing on to more lucrative or more promising cases.

When an attorney assigned to handle an indigent appeal asks to withdraw, he or she is constitutionally obligated to prepare a brief referring to anything in the record that might arguably support an appeal. A brief of that kind must be supplied both to the client, who can use it in the preparation of a substitute brief pro se, and to the appellate court, which can use it as an aid in making an independent appraisal of the claims available.

If the court concludes that counsel is correct in assessing all possible claims as frivolous, a motion to withdraw can be granted and the appeal can proceed on the appellant's pro se brief alone. If, however, the court considers a claim or claims to be arguable, then the appellant must be provided with an advocate to press those claims on the merits.[2] This, of course, was the square holding in Anders.

Mr. Penson's treatment in the instant case comes nowhere close to meeting these well-settled constitutional standards. The lawyer appointed to represent him on appeal failed utterly in his constitutional obligation to advocate on his client's behalf.

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[2] This case provides no occasion for determining whether, in these circumstances, a state court should or must appoint a different attorney to represent the appellant. The desirability of involving a lawyer who has not previously (and publicly) declared that the client's claims are frivolous is, however, self-evident.

By his own admission, counsel merely reviewed the record, decided (mistakenly) that he was unlikely to succeed on any claim, and on that basis asked for permission to withdraw. Counsel did not, and plainly could not, propose that the claims open to his client were frivolous. He reported only that in his view the claims were not so meritorious as to require relief. He submitted no brief referring to claims that might support an appeal and, of course, provided no such brief to Penson.

Thereafter, things only deteriorated constitutionally. The Ohio Court of Appeals fully recognized that there were arguable claims for the appeal and, indeed, found one such claim sufficient to justify a reversal of conviction and vacation of sentence. Nevertheless, the court permitted counsel to withdraw. Rejecting Mr. Penson's timely

request for substitute counsel, the court treated the appeal without the slightest assistance from an advocate for Mr. Penson. While, to be sure, the court overturned one conviction, it sustained Penson's convictions and sentences on all other counts.

The flagrant violation of Mr. Penson's constitutional right to counsel is scarcely mitigated by the coincidence that the court of appeals had access to briefs filed on behalf of Brooks and Smith. By hypothesis, those briefs were prepared by advocates for other appellants, not Penson, and thus could hardly serve as surrogates. By appointing separate attorneys to represent the three co-defendants on appeal, the court of appeals plainly recognized that their interests might well diverge. If it was important to secure separate counsel for each man in order that each, in turn, should have an advocate on his

behalf alone (and it surely was), then it was equally vital to consider the work product of those independent attorneys separately. It is, indeed, the very nature of advocacy that it can serve only one interest, or perfectly consistent interests, at a time.

In sum, the treatment accorded to Mr. Penson by the Ohio courts failed all the relevant constitutional standards established by this Court. The attorney appointed to advocate on his behalf neglected the most rudimentary elements of his constitutional obligations. The Ohio Court of Appeals, in turn, not only permitted counsel to abdicate, but refused to appoint a substitute attorney and thus treated the appeal without benefit of an advocate. All this was flatly inconsistent with the doctrine established in Anders.

The resulting appeal, moreover, was undertaken in stark violation of Penson's

right to the effective assistance of counsel recognized in Evitts, supra. Counsel failed on the most fundamental level to press his client's constitutional claims in the role of a genuine advocate. Quite the contrary, counsel shirked any such responsibility from the outset. Unable to say that his client's claims were frivolous, counsel nevertheless withdrew because he thought (wrongly) that they would not actually win a reversal.

Finally, on a deeper level, the state courts' failure either to keep the original attorney on the job or to provide Penson with substitute counsel constitutes an unadorned violation of the right to appellate counsel recognized in Douglas, supra. Realistically appraised, this case is not about poor representation so much as it is about the absence of any representation at all for a man hopelessly unable to fend for himself.

The egregious disposition of this single appeal by the Ohio courts is rendered more serious by evidence, supplied by Mr. Penson's current counsel, that the Ohio courts maintain a general practice of treating indigents in this manner. In case after case, the courts of Ohio have disregarded the constitutional rights of a series of criminal appellants like Mr. Penson.[3] Unfortunately, but necessarily, this Court must call a halt to this routine neglect of its precedents and must insist that the Ohio courts conform their practices to the fourteenth amendment. To allow this practice to continue would be to invite the courts of Ohio and other states to ignore this Court's constitutional precedents.

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[3] In most instances, the Ohio appellate courts have not had access to briefs filed by advocates for co-defendants.

II. THIS COURT'S PRECEDENTS STRIKE THE PROPER BALANCE BETWEEN APPOINTED COUNSEL'S CONSTITUTIONAL OBLIGATION TO THE CLIENT AND COUNSEL'S PROFESSIONAL RESPONSIBILITIES TO THE COURT

The Ohio courts' departure from precedent in this case can be countenanced only if this Court, too, sees fit to abandon constitutional principles of long standing. We urge the Court not to do so. Surely there can be no question of discarding the bedrock holding in Douglas that indigent criminal appellants have a right to counsel, and it would be untenable to reject the corollary understanding, confirmed so recently in Evitts, that counsel's performance must be effective. We focus, accordingly, on the doctrine forged in Anders precisely for cases such as this, in which appointed counsel seeks to escape an assignment to advocate on behalf of an indigent appellant.

Anders has its detractors. The primary concern seems to be that counsel may find it awkward both to declare that a client's issues are frivolous (necessary to justify a motion to be relieved) and to file a brief referring to claims in the record that might support an appeal. Yet worries such as this depend upon an inaccurate reading of the Anders opinion and a flawed understanding of the reasoning behind that opinion. To demonstrate as much, we divide our argument into two parts--first clarifying the procedure that Anders in fact contemplates and then explaining how that procedure responds to the demands of the situation.

A. What Anders Does (And Does Not) Require of Counsel and the Court

It is essential at the threshold to be clear with respect to the terminology emplcyed in Anders and other cases in which it is

necessary to characterize the relative strength of legal claims. Anders does not ask lawyers to take inconsistent positions--to state that an appeal is frivolous and at the same time to identify nonfrivolous claims. Nor does Anders draw hair-fine distinctions between "frivolous" issues and claims that are not "arguable." Under Anders, claims that are not "arguable" are "frivolous" by definition.

Anders merely recognizes three conventional classes of claims: (1)frivolous claims, i.e., claims so worthless as to be inadmissible in serious professional argument; (2)arguable claims, i.e., claims which may appear weak but which are sufficiently tenable to permit a professional advocate to advance them; (3)meritorious claims, i.e., claims sufficiently strong to be sustained by the reviewing court.

In the cases to which Anders is addressed, only the distinction between the first and the second kinds of claims is crucial. In the first instance, counsel may move to withdraw if he or she has studied the record and has concluded in his or her own mind that the claims available to the client are frivolous (not arguable). Before withdrawal can be approved, however, counsel must file a brief identifying those claims to the court, which "might" find them to be nonfrivolous (arguable) notwithstanding counsel's contrary judgment.

In this regard, counsel's task is hardly so intellectually awkward as some critics suggest. Open-minded professionals are often called upon both to give their own views and to outline alternative positions that other professionals might take--and why. Nor does the recognition that the court may override a

lawyer's judgment bespeak lack of respect for counsel's professional integrity. The point of the "Anders brief" is only to facilitate an independent judicial examination. The reason why a judicial determination is necessary is the matter to which we now turn.

B. Anders' Theoretical Foundations

The doctrinal framework established in Anders responds in a theoretically sound and practically workable fashion to the constitutional values reflected in the due process and equal protection clauses and the incentive structure that must be anticipated in this context.[4]

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[4] The decisions in this line are, in fact, constitutional cases. Anders itself was decided during a period in which the Court occasionally fashioned so-called "prophylactic" rules, not constitutionally mandated themselves but instituted to protect underlying constitutional rights. When the Court announced such rules, however, their special status was noted explicitly. E.g., Miranda v. Arizona, 384 U.S. 436, 467 (1966);

It is useful to begin with the situation in which a nonindigent citizen suffers conviction in a criminal prosecution and contemplates appellate review. By hypothesis, such a nonindigent can purchase the services of a professional advocate to review the record, to marshal the issues, and to file a brief on the merits.

United States v. Wade, 388 U.S. 218, 237-39 (1967). In Anders, by contrast, the Court expressly stated that the doctrine then being elaborated was itself constitutional law:

> The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate....[Counsel's] role as advocate requires that he support his client's appeal to the best of his ability. Of course, if counsel finds his case to be wholly frivolous, ...he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal....

Anders, supra at 744 (emphasis supplied).

Inexperienced observers may conceive of circumstances in which counsel reports that all available claims are so patently frivolous as to make the cause hopeless and in which the appellant chooses to save his or her money. Retained counsel's professional hesitancy to press frivolous claims may also suggest (in the minds of the inexperienced) that nonindigents will abandon efforts to overturn their convictions in an appreciable number of cases and will choose to spend their money in another way.[5]

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[5] It is this vision of a budget-conscious nonindigent whose fastidious retained lawyer balks at frivolous claims which drives the common explanation for refusing to ask appointed counsel to brief the merits of frivolous claims on behalf of indigents. If, it is said, nonindigents would not, and perhaps could not, purchase an advocate's brief on the merits in such a case, then the state does not deny indigents the equal protection of the laws by declining to provide such a brief free of charge. The trouble with this vision, of course, is that it is a vision as opposed to a picture of reality--as we explain in the text.

In actual practice, however, both the magnitude of the players' incentives and the imaginations of retained lawyers make any such scenario exceedingly unlikely. The stakes for the appellant are extraordinarily high. Liberty itself is typically at stake, and it is the rare person who will waive even a remote chance of upsetting a criminal conviction in favor of some other use of capital. We know of no empirical data showing that nonindigent convicts watch their budgets carefully.

Retained counsel, moreover, has a powerful economic incentive to locate some arguable claim to justify charging the client a fee. It seems only reasonable that an intelligent attorney will be able to develop claims that he or she can pursue professionally. Issues sufficient to form the

basis for an appeal are not so cut-and-dried that reasonable minds routinely agree on what is or is not arguable in the minimal sense in which that term is used in the case law. At the very least, it is almost always possible to contest the severity of the client's sentence.

In the end, then, the appellate courts are invariably presented with briefs on the merits in cases in which the appellant is nonindigent. There is no reason to believe, and no evidence to suggest, that nonindigent clients are routinely mistreated by careless attorneys who disregard tenable claims. The incentive structure in place powerfully augers for vigorous appellate advocacy.

In cases involving indigent defendants, by contrast, the incentive structure supplies no similar assurance. Indigents have the same desire as nonindigents to press an appeal in

hopes of obtaining relief. Yet they cannot hire their own lawyers. The great constitutional commitment in Douglas was intended to compensate for the indigent's poverty and to provide appellate counsel free of charge, lest the kind of justice a citizen gets be determined by the amount of money he or she has.

Providing appointed counsel to indigents is only a beginning, however. The state's willingness to pay for the indigent's professional assistance does not invoke the incentive structure at work in nonindigent cases. While the client retains a desire to press forward, appointed lawyers lack the economic incentives that typically motivate retained counsel to satisfy an enthusiastic client by identifying arguable claims.

The fees fixed for legal services in indigent cases are notoriously low,[6] and private lawyers may tend to give such cases short shrift in order to move on to more lucrative opportunities. Salaried public defenders, who lack that naked economic disincentive, are influenced by another of equal power. Their case loads are typically heavy, and they reasonably wish to concentrate scarce time and effort on the most promising cases. Either way--whether the attorney involved comes from the private bar or public service--the incentive structure facing appointed counsel is likely to generate an outsized number of reports that claims are frivolous. Reports of that kind raise very real and justifiable concerns that indigent

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[6] The amicus brief filed in this case by the Ohio Association of Criminal Defense Lawyers reviews the fees available in Ohio.

clients may be denied counseled appeals that are warranted by the circumstances.

Constitutional doctrine, if it is to be meaningful, must take account of this incentive structure and must counter its invidious results. There are only two options. First, the Court can set aside any reservations counsel may have and require an appointed lawyer to brief the merits of at least some claims, despite his or her judgment that those claims are frivolous.[7] Such a rule would have two readily-apparent advantages. Most important, it would approximate the state of affairs with respect to nonindigents. Again, the incentives in favor of briefing the

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[7] Of course, appointed counsel should give the client the benefit of professional judgment and thus may not press every claim sound enough to be considered arguable. Yet there is a world of difference between discarding weak issues and focusing upon stronger claims in a counseled appeal, e.g., Jones v. Barnes, 463 U.S. 745 (1983), and abandoning an appeal altogether.

merits in that context are so strong, on the part of client and counsel alike, that full dress appeals can be expected in virtually every instance.[8]

A rule requiring appointed counsel to brief the merits would also have the virtue of obviating further worry about when, and the conditions under which, counsel can be permitted to withdraw and appeals can be handled without professional representation for the appellant. A bright-line rule--crisp, clean, and easy to administer--would be of great value both to lawyers and to courts. The appellate courts would presumably receive

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[8] The distance between a claim that an appointed attorney considers to be frivolous (under the influence of incentives to undervalue the client's issues in order to justify withdrawal) and claims that a retained lawyer considers to be arguable (under the influence of economic incentives to identify nonfrivolous claims in order to justify charging the client a fee) is likely not to be great.

more briefs on the merits, but those briefs would at least be prepared by lawyers. More significantly, the courts would be freed from litigation over decisions to deny appellate counsel to indigents.

The alternative, of course, is Anders. A lawyer can be appointed to represent an indigent as a vigorous advocate and can be charged to search the record for any arguable claims. If any such claim appears, counsel is duty-bound to brief it for review--just as would a retained attorney representing a paying client. If appointed counsel concludes that all available claims are frivolous and, accordingly, that it would be unprofessional to press them in court, he or she can be permitted to report as much to the client and the court and to move to withdraw.

Given the incentives known to operate upon appointed counsel in these circumstances,

however, the court cannot allow an attorney's personal judgment to determine whether the client is to have a counseled appeal. Accordingly, Anders requires counsel to submit a brief which identifies, both to the client and to the court, the issues counsel considered before asking to be relieved. With such a brief in hand, the court can make an independent appraisal of those claims as a check on counsel's conclusion.

The Anders procedure is theoretically sound and practically workable. Having just examined the record and studied available claims in drawing his or her own conclusions, appointed counsel is in an excellent position to draft an "Anders brief" quickly and efficiently. If such a brief were not required, both the client and the court would be left with only the cold record. Difficult as it may be for an appellate court to locate

arguable issues in a case with counsel's help, it would be much more difficult to identify such issues without the assistance of the lawyer who knows the record best.

As we explained earlier, the instant case does not require the Court to revisit its well-established precedents in this field. Mr. Penson can be given the relief to which he is entitled pursuant to the analysis in Point I, supra. If, however, the Court is inclined to rethink these issues, the only realistic options are to reaffirm Anders or to require appointed counsel to brief the merits in every indigent appeal. Under either option, the procedure followed below was constitutionally deficient. Accordingly, Mr. Penson's conviction cannot be upheld without breaking faith with Douglas itself.

III. CRIMINAL APPELLANTS WHO SUFFER THE KIND OF CONSTITUTIONAL VIOLATION EVIDENT IN THIS CASE ARE ENTITLED TO REVERSAL WITHOUT A SPECIAL SHOWING OF "PREJUDICE"

The Ohio Court of Appeals' attempt to save its judgment on the ground that Mr. Penson was not "prejudiced" by lack of appellate counsel is wholly inadequate. To take that position, the state court had to reject the thinking behind Douglas, Evitts, and Anders at the most fundamental level. That court had to conclude that its own, unaided examination of the cold record somehow substituted for the appellate advocate to which Penson was constitutionally entitled. Yet the precedents reflect the judgment that the appraisal of which a neutral appellate court is capable simply cannot suffice for vigorous advocacy by an attorney charged to represent a client with warm zeal. In our constitutional system, criminal appeals are

and must be adversarial in character, and no disinterested review by a court, however sympathetic, can serve as well.

This court has occasionally made a special showing of "prejudice" an essential element of a substantive constitutional claim. The impulse to do that in some circumstances is understandable. In an ordinary "effective assistance of counsel" case, for example, it may often be easy to identify some flaw in counsel's trial-level performance. And if reversal were required in every such case, criminal convictions would rarely withstand review. The Court has therefore insisted that counsel's errors must have "prejudiced" the client. Strickland v. Washington, 466 U.S. 668 (1984).

The Court has held explicitly that no special showing of "prejudice" is necessary in cases in which the state utterly fails to

provide any counsel. E.g., Gideon v. Wainwright, 372 U.S. 335 (1963)(denial of counsel at trial); Cuyler v. Sullivan, 446 U.S. 335 (1980)(denial of conflict-free counsel). As the Court explained in Strickland, supra, "prejudice" can be presumed in these cases for two reasons. First, the existence of "prejudice" is so likely that a case-by-case inquiry is "not worth the cost." Second, the impairment of the individual's constitutional rights is "easy to identify" and thus "easy for the government to prevent." Id. at 692.

The instant case is, of course, one in which counsel was not provided at all. The attorney who was appointed for Mr. Penson promptly withdrew, and the appeal which followed was heard after counsel had been released. There is no dispute about this. The Ohio Court of Appeals explicitly

recognized that no attorney appeared for Mr. Penson. Nevertheless, that court considered and decided the arguable claims the court itself put in Penson's mouth.

Because counsel was not provided at all, the likelihood of "prejudice" to Mr. Penson was palpable. As the Court explained in Douglas, appellate counsel supplies the only "real chance" an indigent has to demonstrate that claims have "hidden merit" that is not apparent from the "barren record." 372 U.S. at 356.

And, of course, the constitutional violation here was glaring. The state of Ohio had an unquestioned constitutional obligation to provide Mr. Penson with counsel on appeal and flatly failed to meet that obligation. The Ohio Court of Appeals fully understood the implications of allowing the original appointed attorney to withdraw and refusing to

appoint a substitute. This was not a case in which appointed counsel allegedly failed to serve a client properly in circumstances in which it was difficult for state officials to detect the wrong and set it right. It would have been a simple matter to avoid the violation of Mr. Penson's rights. So far from ensuring that counsel assumed his responsibilities, the court of appeals capitalized on counsel's default and deliberately denied Mr. Penson any appellate counsel.

This Court would send a dangerous signal to lawyers and courts if it were to sustain the Ohio courts' decision in this case on the ground that Mr. Penson was not "prejudiced." State courts would be tempted to disregard Douglas routinely and thus to handle indigent appeals ex parte--explaining away their failure to conform to the fourteenth amendment

on the ground that, in their view, counsel was not needed. Indeed, this is precisely what Ohio seems already to be doing on the apparent hope that this Court will acquiesce. If Douglas is not to be overruled by the back door, and if the very real reasons for supplying indigent appellants with counsel are not to be ignored, then a frank failure to provide Mr. Penson with an advocate in this case must bring reversal.

Because this case, like Evitts, provides no occasion for evaluating the "effectiveness" of counsel on appeal, any inquiry into "prejudice" would be misplaced. We hasten to add, however, that when the Court takes a case in which this "prejudice" question is actually presented, the greatest care should be taken to avoid any standards that defy effective enforcement.

CONCLUSION

For the reasons stated herein, the decision below should be reversed and the case remanded for the appointment of a professional advocate to represent Mr. Penson in new appellate proceedings in state court.

Respectfully submitted,

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